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Supreme Court of the United States,

OCTOBER TERM, 1928.

No. 732

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, sued in the name of the United States Shipping Board Emergency Fleet Corporation, and CONSOLIDATED NAVIGATION COMPANY, INC.,

Petitioners,

v.

BENJAMIN LUSTGARTEN, an infant, by his Guardian ad Litem, JOHN A. LYDECKER,

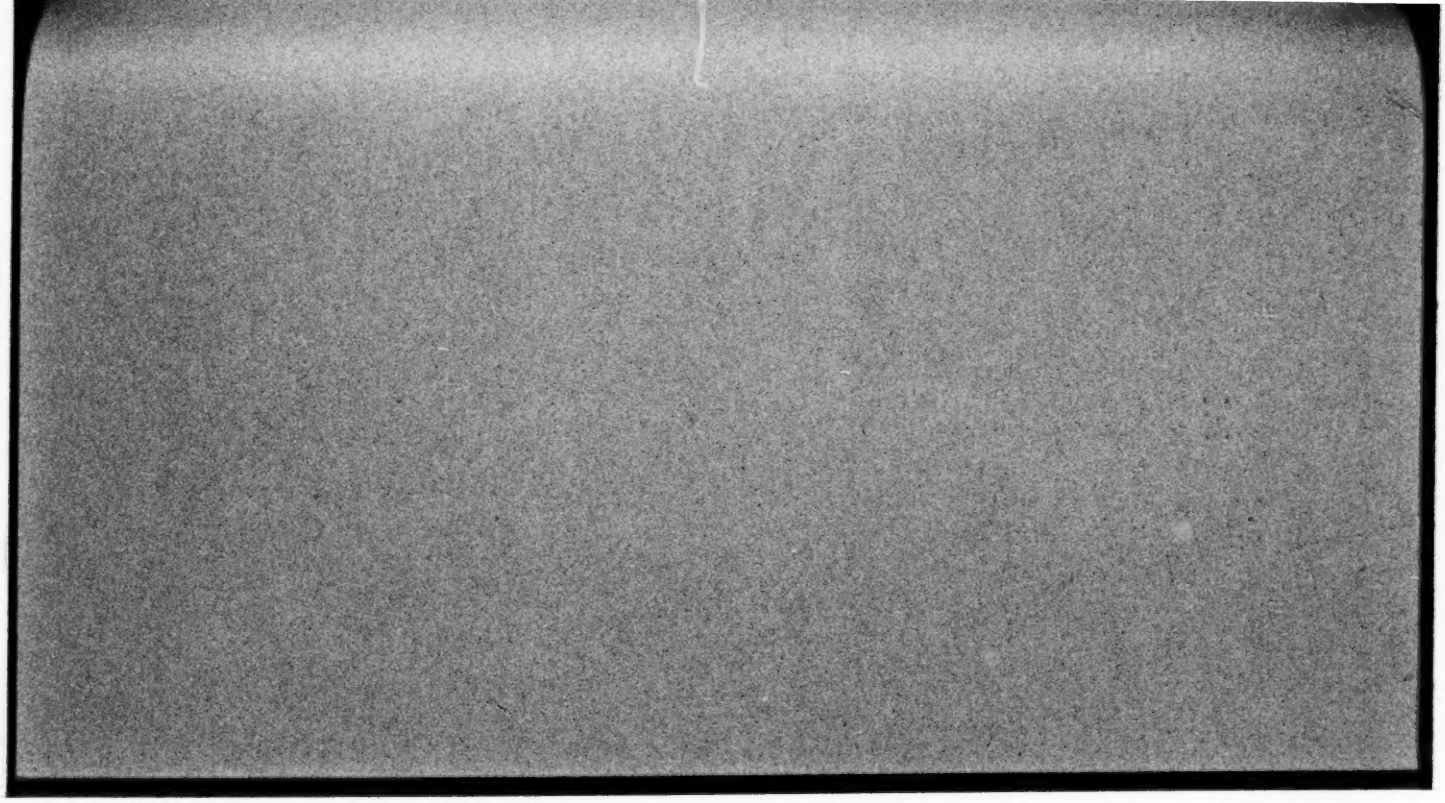
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SILAS B. AXTELL,
Attorney for Respondent.

BENJAMIN I. SPERLING,
Of Counsel.

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UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, sued in the name of the United States Shipping Board Emergency Fleet Corporation, and CONSOLIDATED NAVIGATION COMPANY, INC.,

Petitioners,

v.

BENJAMIN LUSTGARTEN, an infant, by his Guardian ad Litem, JOHN A. LYDECKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Respondent, on March 5, 1926, while employed as a seaman on board the S. S. "Coelleda", sustained severe personal injuries. He was slightly over eighteen years of age at the time, and the master of the vessel compelled him to work immediately after sustaining these injuries, and failed to provide him with proper medical attention, all of which aggravated his injuries and resulted in tuberculosis. Thereafter, by his Guardian ad Litem, the infant brought an action for damages at law in the United States District Court for the Southern District

of New York, under the authority of Section 33 of the Jones Act (June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, 46 U. S. C. 688) against two defendants, United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, Inc. The defendant, Consolidated Navigation Company, Inc., a private corporation organized under the laws of the State of Maryland (R. 329), managed and operated the S. S. "Coelleda" under an agency agreement set out in full at pages 329-338 of the Record.

The jury rendered a verdict in favor of the plaintiff for $10,000, upon which judgment was entered against both defendants. The United States Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court on the authority of *Sloan Shipyards Corporation* v. *U. S. Shipping Board Emergency Fleet Corporation,* 258 U. S. 549, and *U. S. Shipping Board Emergency Fleet Corporation* v. *Greenwald* (C. C. A.) 16 F. (2nd) 948 (R. 355).

The case now comes before this Court on a petition for a writ of certiorari, to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit. As the basis for this application, petitioners argue that the defendant, Consolidated Navigation Co., Inc., is not liable to suit because it operated the "Coelleda" merely as the agent of the United States; and that the Fleet Corporation also is not liable for the same reasons which it advanced seven years ago in the case of *Sloan Shipyards Corporation* v. *U. S. Shipping Board Emergency Fleet Corp'n, supra.*

Argument.

POINT I.

It is well settled that the Fleet Corporation may be sued in an action at law; this Court so ruled in *Sloan Shipyards Corporation* v. *Fleet Corporation*, 258 U. S. 549 (1922).

The judgment and decree of the Courts below do not present any question that is novel or unsettled. The old and outworn arguments now advanced by petitioners have been thoroughly considered and passed upon by this Court and by other Courts on numerous occasions.

Sloan Shipyards Corporation v. *U. S. Shipping Board Emergency Fleet Corp.*, 258 U. S. 549 (1922);
United States v. *Strang*, 254 U. S. 491 (1921);
The Lake Monroe, 250 U. S. 246 (1919);
U. S. Shipping Board Emergency Fleet Corp. v. *Greenwald*, 16 F. (2d) 948 (1927);
U. S. Shipping Board Emergency Fleet Corp. v. *O'Shea*, 5 F. (2d) 123 (1925);
Wallace v. *U. S. Shipping Board Emergency Fleet Corp.*, 5 F. (2d) 234 (1925);
Cox v. *Lykes Brothers and U. S. Shipping Board Emergency Fleet Corp.*, 237 N. Y. 376 (1924).

Petitioners lay emphasis on the purpose of the Merchant Marine Act of June 5, 1920 (c. 250, 41 Stat. 988), as set forth in Sections 1, 12 and 35 of that Act (U. S. C. Title 46, Secs. 861, 871, 886). They argue therefrom that

the operation of a ship must be declared to be in performance of a function of government, and accordingly that the Fleet Corporation and Consolidated Navigation Co., Inc., are government agents, not personally responsible, but immune from suit. We respectfully call attention to the fact that this Court considered and discussed the significance of this very same Merchant Marine Act of 1920 in the *Sloan Shipyards* case, decided in 1922. The Court in its opinion (at p. 566) specifically refers to sections of the Act, and after considering their import, concludes that the Fleet Corporation is nevertheless subject to suit. The Fleet Corporation in the *Sloan Shipyards* case argued that it so far embodies the United States that the suit should have been brought in the Court of Claims, as it was in effect a suit against the United States. This Court disposed of the argument as follows:

> "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name" (pp. 567-568).

The fact that the Fleet Corporation was formed under the General Laws of the District of Columbia is alone persuasive that it is expected to stand suit in its own person, whatever indemnities might be furnished by the United States. *Sloan Shipyards,* 258 U. S. 549, at page 570.

Petitioners' brief quotes from the opinion of this Court in *Fleet Corporation* v. *Western Union,* 275 U. S.

415, at page 422, to the effect that the services of the Fleet Corporation in the operation of its vessels are of a public nature, in view of the language of the Merchant Marine Act of 1920. But this Court carefully weighed the significance of this same Act and accorded it full recognition in the *Sloan Shipyards* case (see *supra*). There is, moreover, nothing inconsistent between the holding of this Court in the *Western Union* case and the liability of the Fleet Corporation in the instant case, as enunciated in the *Sloan Shipyards* case. All that was decided in the *Western Union* case was that the Fleet Corporation is a department of the United States within the meaning of the Post Roads Act (July 24, 1866, c. 230, 14 Stat. 221, 47 U. S. C., Secs. 1-3, 6) so as to entitle it to the government rate on telegraphic messages sent over the lines of the Western Union, "not because it is an instrumentality of the government, but because it is a department of the United States within the meaning of the Post Roads Act" (275 U. S. 415, at p. 426). Since the Western Union never questioned the right of the United States Shipping Board to the government rate on official messages, this Court held that it ought to accord equal treatment to the messages of the Fleet Corporation.

Petitioners advance the further argument that an exclusive remedy was afforded the respondent under the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525, U. S. C. Title 46, Secs. 741 *et seq.*) which prevented him from resorting to an action at law, and they lay stress upon a dictum of this Court in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, at page 214. The only proper inference to be drawn from the passing remark

of Mr. Justice Sanford in the *Rosenberg Bros.* case is that this question was not involved in the matter then before the Court for decision, not that the Court reserved it for future consideration.

It must be borne in mind that the Suits in Admiralty Act of March 9, 1920, had been enacted upwards of two years prior to the decision of this Court in the *Sloan Shipyards* case, and that this Court decided against the contentions of the Fleet Corporation and held it amenable to suit both at law and in equity. If there were any merit to the argument that this Act provides the exclusive remedy of resorting solely to a libel in admiralty, the *Sloan Shipyards* case would have been decided differently, for in that case the plaintiff brought a bill in equity against the Fleet Corporation, and in the companion case, *Astoria Marine Iron Works* v. *Emergency Fleet Corporation,* 258 U. S. 549, 569, the plaintiff brought an action at law, yet this Court held that there was jurisdiction in the State and Federal Courts to entertain both classes of actions against the Fleet Corporation. The Court in the *Sloan* case specifically referred at page 567 of its opinion to the fact that the argument was then being advanced that special remedies were provided by statute that displace those that otherwise would be at the plaintiff's command.

Furthermore, consideration was given in the *Sloan* case to the effect of the argument now being advanced by the Fleet Corporation that the Suits in Admiralty Act affords the exclusive remedy because it provides uniformity. The answer to this argument that lack of uniformity would obtain if the Fleet Corporation were

subject to suit is found at pages 568-569 of the opinion in the *Sloan* case:

> "It is suggested that there will be lack of uniformity if suits can be brought in State Courts. This consideration cannot control our conclusion from the Statutes. But it is not very serious, since such suits against this Corporation can be removed to the Courts of the United States (Pacific R. Removal cases, 115 U. S. 1), and afterwards are subject to review here."

The same contention was raised by the Fleet Corporation in *United States Shipping Board Emergency Fleet Corporation* v. *O'Shea,* 5 F. (2nd) 123 (1925), and in *Wallace* v. *United States Shipping Board Emergency Fleet Corporation,* 5 F. (2nd) 234 (1925), and the Courts disposed of it in like manner relying upon the decision of this Court in the *Sloan* case as determinative. These cases squarely hold that the Suits in Admiralty Act invoked by the defendants has no application in a case of this kind. And they hold further that the oft-repeated argument of the Fleet Corporation that there might be confusion if this Act is not held exclusive, is one which cannot control the determination of the Courts.

POINT II.

Section 33 of the Jones Act expressly authorizes common law actions by seamen for personal injuries sustained in the course of their employment. The courts without exception have held the Fleet Corporation and its operating agents liable in such common law actions.

Section 33 of the Jones Act (June 5, 1920, c. 250, 41 Stat. 1007, U. S. C. Title 46, Sec. 688) provides as follows:

> Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the *right of trial by jury*, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Italics ours.)

It is significant that this Act was passed subsequently to the Suits in Admiralty Act of March 9, 1920, and that it contains no limitation such as the petitioners now

seek to impose upon this respondent on his rights as an injured seaman to bring an action at law against the Fleet Corporation and the managing and operating agent. Nor is there a word in the entire earlier statute, the Suits in Admiralty Act of March 9, 1920, which would deprive the respondent herein of his right to "maintain an action for damages at law, with the right of trial by jury" which is so carefully safeguarded to him by Section 33 of the Jones Act, enacted on June 5, 1920.

The language of Section 33 of the Jones Act is clear, explicit and comprehensive:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury * * *."

This Court in *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375 (1924), thoroughly considered the significance and applicability of Section 33 of the Jones Act, stating that it was enacted as part of an Act the expressed object of which was "to provide for the promotion and maintenance of the American merchant marine" (264 U. S. 375, at p. 389). And that the terms of the statute are not imperative but permissive. "It says 'may maintain' an action at law 'with the right of trial by jury', the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the Court with a trial by jury as an incident" (264 U. S. 375, at pp. 390-391).

The Court in *Panama R. R. Co.* v. *Johnson,* plainly states that the right of an injured seaman to maintain an action for damages at law with the right of trial by

jury is conferred by an Act the avowed purpose of which is "to provide for the promotion and maintenance of the American merchant marine" (264 U. S. 375, at p. 389). And yet this is the very language of the Merchant Marine Act of June 5, 1920, now relied on by petitioners in support of their present argument.

The Courts without exception have held the Fleet Corporation and its managing and operating agents liable in such common law actions; and they have uniformly held that there is no warrant or basis whatsoever in the letter or spirit of the Act for any exception thereto in favor of Fleet Corporation vessels.

Emergency Fleet Corporation v. *O'Shea,* 5 F. (2nd) 123 (1925);
Wallace v. *Emergency Fleet Corporation,* 5 F. (2nd) 234 (1925);
Emergency Fleet Corporation v. *Greenwald,* 16 F. (2nd) 948 (1927);
Howarth v. *Emergency Fleet Corp'n et al.,* 24 F. (2nd) 374 (1928).

See also:

Cox v. *Lykes Brothers and Emergency Fleet Corporation,* 237 N. Y. 376 (1924).

Both the Fleet Corporation and the Consolidated Navigation Co., Inc., are liable for this tort to the plaintiff, as owners *pro hac vice,* and as agents, since they are primarily and secondarily responsible for the management and operation of the S. S. "Coelleda". The Fleet Corporation executed the operating agreement, selected the managing agent, received and collected the revenues of the vessel and the funds were deposited in a bank in its

name. The fact that the Fleet Corporation retained a check on the personnel and allowed the cost of the ship's food and supplies to be charged to its account by the Consolidated Navigation Co., in no way discharges the responsibility of the latter as a joint tort feasor. The defendant Consolidated Navigation Co., Inc., a private commercial corporation, organized for profit and existing under the laws of the State of Maryland, agreed to man, equip, victual and supply the vessel, and to pay the costs and expenses incident to the management, operation and conduct of the business of the vessel; to maintain and repair it; to exercise reasonable care to protect and safeguard the interests of the owner and to avoid loss and damage to the owner; to select agents or sub-agents and be responsible in all respects for their acts, and such sub-agents were in no respect to be the agents of the owner but solely the agents of the Consolidated Navigation Co., Inc.; to pay the costs and expenses of furnishing and preparing all cargo and shipping documents, all administrative and general expenses and the fees and expenses of its sub-agents. It further agreed that whenever the owner required, it would furnish a bond for the faithful performance of its duties and obligations under the agreement (R. fol. 1006). It received as compensation a percentage of the gross freight and passenger revenue (R. fols. 997-999).

Similar operating agreements have been before the Courts on numerous occasions, and after thorough consideration the managing and operating agents have been held to be owners *pro hac vice* together with the principal, the Fleet Corporation. In *Fleet Corporation* v. *Greenwald,* 16 F. (2d) 948 (1927), the Court held the operating agents A. H. Bull & Co. liable, together with the

Fleet Corporation, as owners *pro hac vice* for the death of a seaman.

Clause 7 of the Agency Agreement in the instant case provides that the agent shall be responsible for the acts of its sub-agents and that the latter shall not in any respect be the agents of the owner but solely the agents of said agent (R. fol. 992). This provision is alone sufficient to stamp the Consolidated Navigation Co., Inc., as an owner *pro hac vice.*

In *Thorp* v. *Hammond,* 79 U. S. 408 (1870), the person who had made an arrangement to man, equip and supply his ship and retain half the net freight was held personally liable as an owner *pro hac vice* for a collision with another vessel.

Petitioners argue that the Consolidated Navigation Co., Inc., as the operating agent of the S. S. "Coelleda" is a public agent without responsibility unless for its personal negligence, and they cite *Robertson* v. *Sichel,* 127 U. S. 507 (1888), as their apparent authority for this view. That case lends no support whatever to the proposition that the operating corporation in the instant case is immune from suit. All that was decided in *Robertson* v. *Sichel* was that the Collector of Customs for the Port of New York was not personally liable for the negligence of his subordinates in failing to send a passenger's trunk to the public store, where there was no evidence to connect the Collector personally with the wrong or that the subordinates were not competent or not properly selected for their positions. In our case we are dealing with corporations, not individuals, and it is elementary that corporations can act only through their agents and employees and are responsible for their acts. The argument

of petitioners amounts to this—that a corporation is not responsible for the negligent acts of its employees, and that if the latter are negligent, the corporation is not answerable therefor.

To speak of Consolidated Navigation Co., Inc., as a public agent, immune from suit for the torts of the master of the vessel, does violence to language. If the doctrine of immunity did not avail the Fleet Corporation as this Court decided in the *Sloan* case, *a fortiori,* it cannot avail a private corporation organized under the laws of a State and engaged in the business of operating vessels for profit.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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